No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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On May 11, 1961, the United States Court of Appeals for the Second Circuit decided the case of *United States of America, Appellee, v. Francis J. De Sisto, Appellant,* 289 F. 2d 833. In the *De Sisto* case, the Appellant was convicted in the trial Court of obstruction of interstate or foreign commerce, and he appealed. The Court of Appeals for the Second Circuit reversed the conviction on the ground that extensive questioning of witnesses and defendant himself, by the District Court Judge, and repeated belittling by trial Judge of efforts to establish an alibi, improperly conveyed the impression of the Court's

belief in defendant's probable guilt which could not be cured by instructions.

The Circuit Court of Appeals, speaking through Judge J. Joseph Smith, in reversing the trial Court, stated:

> "A trial judge in criminal, as in civil cases, may, indeed must, be more than a mere moderator or umpire in a contest betweeen two parties in an arena before him. He should take part where necessary to clarify testimony and assist the jury in understanding the evidence and its task of weighing it in the resolution of issues of fact. United States v. Curcio, 2 Cir., 279 F.2d 681; Knapp v. Kinsey, 6 Cir., 232 F.2d 458, 465. He must not, however, usurp the functions either of the jury or of the representatives of the parties and must take care not to give the jury an impression of partisanship on either side. United States v. Curcio, supra, 279 F.2d at page 685; United States v. Brandt, 2 Cir., 196 F.2d 653. Counsel on this appeal make much of the number and percentage of questions asked by the judge in this trial. (Prosecutor's questions of all witnesses 1381, all defense counsel 3330, Court 3115. Prosecutor's questions of defendant DeSisto 347, defense counsel 201, Court 306.) It is indeed an impressive proportion, but no such mathematical computation is of itself determinative. However, taking all this in conjunction with the long and vigorous examination of the defendant himself by the judge, and the repeated belittling by the judge of defendant's efforts to establish the time that Fine left the pier, we fear that in its zeal for arriving at the facts the court here conveyed to the jury

> too strong an impression of the court's belief in the defendant's probable guilt to permit the jury freely to perform its own function of independent determination of the facts. United States v. Brandt, supra, 196 F.2d at page 656. We do not feel that it was possible to remove the impression by the instructions given in the charge. We are constrained therefore to reverse the conviction of DeSisto and remand for a new trial."

The Circuit Court of Appeals, in the *De Sisto* case, cited *United States v. Brandt,* 196 F. 2d 653. In the *Brandt* case the defendants were convicted of using the mails to defraud, and they appealed. The Circuit Court of Appeals for the Second Circuit reversed the decision of the trial Court on the grounds that the conduct of the trial Judge during the trial of said case had improperly departed from that impartial attitude to which all defendants are entitled.

The Circuit Court of Appeals, through Judge Clark, in reversing the trial Court, stated:

> "A trial judge conducting a case before a jury in the United States courts is more than a mere 'moderator,' Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321; Montrose Contracting Co. v. Westchester County, 2 Cir., 94 F. 2d 580, 587, certiorari denied Westchester County v. Montrose Contracting Co., 304 U.S. 561, 58 S. Ct. 943, 82 L.Ed. 1529, but he is decidedly not a 'prosecuting attorney,' United States v. Guertler, 2 Cir., 147 F.2d 796, certiorari denied 325 U.S. 879, 65 S.Ct. 1553, 89 L.Ed. 1995; Hunter v. United States, 5 Cir., 62 F.2d 217, 220. He enjoys the prerogative, rising often to the standard

of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues. Pariser v. City of New York, 2 Cir., 146 F.2d 431. To this end he may call witnesses on his own motion, adduce evidence, and himself examine those who testify. See United States v. Marzano, 2 Cir., 149 F.2d 923; Guthrie v. Curlett, 2 Cir., 36 F.2d 694; Young v. United States, 5 Cir., 107 F.2d 490, 493; 3 Wigmore on Evidence § 784, 3d Ed. 1940. But he nonetheless must remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Minuse, 2 Cir., 114 F.2d 36; Martucci v. Brooklyn Children's Aid Soc., 2 Cir., 140 F.2d 732; United States v. Marzano, 2 Cir., 149 F.2d 923.

"In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are

entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses.

"The government insists on the curative effect of the charge, in which the jury was admonished that its own view of the evidence controlled, citing the similar case of United States v. Aaron, 2 Cir., 190 F.2d 144, certiorari denied Freidus v. United States, 342 U.S. 827. Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given."

The Circuit Court of Appeals, in deciding the *Brandt* case, cited in a footnote appearing in 196 F. 2d at 656, the case of *Williams v. United States,* decided by the Circuit Court of Appeals for the Ninth Circuit, 93 F. 2d 685.

In the *Williams* case, the defendants were convicted of mail fraud and conspiracy in the trial Court. On appeal the Circuit Court of Appeals for the Ninth Circuit reversed the conviction on the grounds that the trial Judge did not conduct the trial in an impartial manner.

The Court, through Judge Garrecht, stated:

> "In reviewing this assignment, we are not unmindful that the able District Judge who tried this case has, heretofore, established a reputation for fairness and judicial poise, and in this opinion we do not wish to imply that the trial judge intentionally was unfair. But as the authorities herein referred to point out, the harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of disinterestedness which is the foundation of a fair and impartial trial.'
>
> "The closing language of the opinion in Hunter v. United States, supra, 62 F.2d 217, at page 220, is applicable to the lower court's activities in the instant case, both with respect to the examination of witnesses and the instructions to the jury:
>
> 'That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman or the jury to be impartial.' "

The trial record in the case at bar, when viewed in the light of these decisions, conclusively establishes

that the Appellant did not receive a fair and impartial trial.

For the reasons stated in Appellant's Opening Brief, and in this Reply Brief, the judgment of the trial Court should be reversed.

Dated, Reno, Nevada,
July 20, 1961.

Respectfully submitted,
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By WILLIAM O. BRADLEY,
Attorneys for Appellant.